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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

F. H. REILY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit entered in the above-entitled cause on December 23, 1932 (R. 57), affirming a decree of the District Court for the Western District of Oklahoma dismissing the Government's bill of complaint (R. 20–22).

OPINIONS BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law appear at R. 47–48. The opinion of the Circuit Court of Appeals (R. 56) is reported in 62 F. (2d) 621.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 23, 1932 (R. 57). Petition for rehearing was denied January 24, 1933 (R. 59). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the Act of June 21, 1906, p. 9, *infra*, removed the restrictions upon the alienation of the allotted land of a Mexican Kickapoo Indian who resided in Mexico at the time of and after the passage of that Act.

(2) Whether the Act of June 21, 1906, removed the restrictions upon the alienation of the inherited land of a Kickapoo Indian who at the time of the inheritance and at all times thereafter was a resident of the United States.

STATUTE INVOLVED

That portion of the Act of June 21, 1906, c. 3504, 34 Stat. 325, 362, relative to this case is set forth in Appendix A, p. 9, *infra*.

STATEMENT

This is an action in equity by the United States to restrain the respondent from interfering with the leasing and managing of and from trespassing upon certain Indian lands held in trust by the United States (R. 1–3). The bill of complaint

alleged that the United States was the owner of a certain quarter-section of land located in Pottawatomie County, Oklahoma, which land was held in trust for the benefit of the heirs of Wah-puck-we-che, a deceased allottee of the Mexican Kickapoo Tribe of Indians; that on October 18, 1930, the United States, through the Indian Superintendent, leased the land in question to one Craig, who entered thereupon and was in possession thereof; that the respondent, claiming some right in the land, had filed a suit for an injunction in a State court against the Superintendent and the lessee seeking to enjoin them from exercising any right with respect to the leasing, management, or possession of the land; that the respondent had unlawfully entered upon and was trespassing upon the land; and prayed that the respondent be enjoined from interfering with the leasing and managing thereof by the United States (R. 1–3).

The respondent filed an answer (R. 6–11) in which he alleged that on May 20, 1930, he had purchased the land from Wa-pe-com-e, the sole heir of Wah-puck-we-che. The answer set forth a deed from Wa-pe-com-e (R. 11–12) and alleged that the deed was valid and that Wa-pe-com-e had the right to convey the land to the respondent. The answer admitted the alleged interference by the respondent with the leasing, management, and possession of the land (R. 6–10).

After a trial, the District Court made findings of fact and conclusions of law (R. 47–48). The court found that the land in question was allotted to Wah-puck-we-che as a member of the Kickapoo Tribe of Indians; that the said allottee died in January, 1929 and that Wa-pe-com-e, her only son and heir, inherited the land; that Wah-puck-we-che and Wa-pe-com-e left Oklahoma and went to Mexico in 1903 and resided there for many years and after the passage of the Act of June 21, 1906; that Wa-pe-com-e returned to the United States about the year 1920 and has resided in the United States since that date; that Wah-puck-we-che returned to the United States in 1927 and died in Oklahoma; that on May 20, 1930, Wa-pe-com-e, as the sole heir of Wah-puck-we-che, conveyed the land to the respondent Reily (R. 47–48).

The District Court also found that the United States Superintendent of the Shawnee Indian Agency leased the land in question to Craig on October 8, 1930, on behalf of the undetermined heirs of Wah-puck-we-che, and that the respondent had obtained a permanent injunction in the District Court of Pottawatomie County against the Superintendent and Craig restraining and enjoining them from interfering with respondent's possession of the land.

Upon these findings the District Court held that upon the death of Wah-puck-we-che, Wa-pe-com-e became vested with power to convey the land free from any supervision by the United States, and

that the deed from Wa-pe-com-e to the respondent conveyed to the latter a good title. The District Court thereupon ordered that the bill of complaint be dismissed, and decreed that the United States, and those on whose behalf the bill of complaint was brought, had no right or interest in the land (R. 48). Upon appeal, the decree of the District Court was affirmed by the Circuit Court of Appeals (R. 57), and thereafter a petition for a rehearing was denied (R. 59).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the land in question was free from the statutory restrictions against its alienation at the time of its alleged conveyance to the respondent;

(2) In holding that upon the death of the allottee her sole heir, Wa-pe-com-e, became vested with full and unrestricted power to convey the land to the respondent;

(3) In affirming the decree of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is probably erroneous.

The Indian Appropriation Act of June 21, 1906, p. 9, *infra,* provided in part as follows:

> All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita

> Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: *Provided,* That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years: * * *

In order to give meaning to the proviso to the statute above quoted, it is necessary to construe the words "inherited and otherwise", used in the statute, as not including land held at the time of the Act by virtue of an *allotment.* The statute has been so construed in *Johnson* v. *United States,* 283 Fed. 954 (C.C.A. 8th), where the court said (p. 956):

> when the whole paragraph is read with a view of sustaining it in all its parts the word "otherwise," in the second line, seems to be in contradistinction to allotment, so that it was clearly intended that all restrictions as to sale and incumbrance of lands, inherited or otherwise acquired (except allotments of surviving allottees), were removed under the conditions named.

If the foregoing is a correct construction of the statute, then the residence in Mexico of the allottee Wah-puck-we-che after the passage of the Act of June 21, 1906, did not operate to remove the re-

strictions upon the alienation of the allotted land and, accordingly, the land remained subject to such restrictions at the time of her death. (See the Act of February 8, 1887, c. 119, 24 Stat. 388, 389, as amended (U.S.C., title 25, sec. 348).)

Nothing happened upon or after her death to change the status of the land. Wa-pe-com-e was the sole heir. He lived in Mexico with his mother until about 1920, when he returned to the United States where he has since resided. When he resided in Mexico he had no interest in the land, since his mother was still alive. When the land descended to him by inheritance, he was residing in the United States. Accordingly, when Wa-pe-com-e acquired the land by inheritance, he was not a nonresident of the United States and the statute did not operate to remove the restrictions thereon. Since the land was subject to the statutory restrictions at the time of its attempted conveyance by Wa-pe-com-e to the respondent Reily, such conveyance was wholly invalid.

The Circuit Court of Appeals did not discuss the legal questions involved, but said (R. 56) that the instant case was not substantially different from *United States* v. *Estill,* 62 F. (2d) 620, a case which had just been decided by the Circuit Court of Appeals, a copy of the opinion in which case appears in Appendix B, pp. 11–13, *infra.* But in the *Estill case* both the District Court and the Circuit Court of Appeals found as a fact that the Indian heirs in question resided in Mexico *after the*

passage of the Act of June 21, 1906, and after they had inherited the land in question. The Government does not question the correctness of the decision of the court below in the *Estill case* but contends that the two cases are distinguishable upon their facts.

The construction of the statute sought by the Government is in harmony with the rule that doubtful legislation is to be construed in favor of the Indians (*Worcester* v. *Georgia*, 6 Pet. 515, 582; *United States* v. *Celestine*, 215 U.S. 278, 290).

2. The question presented is one of importance in the administration of the statute involved. We are advised by the Department of the Interior that the decision of the Circuit Court of Appeals in the instant case will affect the title to land now held or formerly held by a considerable number of Indians of the various tribes mentioned in the statute. Moreover, the question presented is of importance because of its bearing upon the right of the State of Oklahoma to levy taxes upon lands similar to those here involved; the right of the State to impose a tax depends, of course, upon whether or not allotted lands, such as those here involved, remain subject to the statutory restrictions. *United States* v. *Rickert*, 188 U.S. 432; *Goudy* v. *Meath*, 203 U.S. 146.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.

APRIL, 1933.

APPENDIX A

ACT OF JUNE 21, 1906, C. 3504, 34 STAT. 325, 362 363

That the Secretary of the Interior be, and he hereby is, directed to immediately cause to be paid to those Kicking Mexican Kickapoo allottees, who under the Act of Congress of March third, eighteen hundred and ninety-three, elected to leave in the Treasury their share of the funds provided for in Article V of said Act, the sum of money to their credit, together with interest thereon, as provided by said Act, and as also provided by the Act of June tenth, eighteen hundred and ninety-six; the shares of minors to be paid to the parents or next of kin having the care and custody of said minors, the shares of deceased persons to be paid to their heirs; all of said payments to be made upon claim through the First National Bank or the Border National Bank, of Eagle Pass, Texas, except that the Kickapoos now residing in Oklahoma may receive their shares through the United States Indian agent at Shawnee, Oklahoma, if they so desire; and for the purpose of carrying this provision into effect there is hereby appropriated the sum of forty thousand dollars, or so much thereof as may be necessary, out of any funds in the Treasury of the United States not otherwise appropriated, the same to be immediately available.

All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo,

and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: *Provided*, That any such Indian allottee who is a nonresident of the United States may lease his allotment without restriction for a period not exceeding five years: *Provided further*, That the parent or the person next of kin having the care and custody of a minor allottee may lease the allotment of said minor as herein provided, except that no such lease shall extend beyond the minority of said allottee.

APPENDIX B

United States Circuit Court of Appeals Tenth Circuit

No. 612—September Term, 1932

United States of America, appellant

vs.

Wallace Estill, Joe S. Ellis, A. F. Nowakoski, Mary Nowakoski, The Federal National Bank of Shawnee, Oklahoma, a Corporation, appellees

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Appeal from the District Court of the United States for the Western District of Oklahoma

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(December 23, 1932)

Before *Lewis, Cotteral,* and *Phillips,* Circuit Judges.

Lewis, *Circuit Judge,* delivered the opinion of the court.

This suit was brought by the United States to quiet title to eighty acres of land in Oklahoma that had been alloted in 1894 to Mah-no-ne-mah, a Kick-

apoo Indian. The United States had title in trust for the sole use of Mah-no-ne-mah and his heirs under the provisions of the fifth section of the General Allotment Act of February 8, 1887 (24 Stat. 388). Mah-no-ne-mah went to the Republic of Mexico to reside, as did many of the Kickapoos, and he died there in 1905. This suit was brought in the interest of his heirs. He left surviving him as his sole heirs his widow, I-nesh-kin, and a son, Pah-ko-che-pe-ta, by his divorced wife, Nah-she-pe-eth. The defendants Nowakoski, appellees here, are remote grantees of remote heirs of Mah-no-ne-mah. The defendant bank disclaimed. The other defendants are Nowakoski's mortgagees.

The inquiry is whether the facts bring this case within the terms of the Act of June 21, 1906 (34 Stat. 363), removing restrictions as to sale of the eighty acres. The Act so far as material reads thus:

> All restrictions as to sale and incumbrance of all lands, inherited and otherwise, of all adult Kickapoo Indians, and of all Shawnee, Delaware, Caddo, and Wichita Indians who have heretofore been or are now known as Indians of said tribes, affiliating with said Kickapoo Indians now or hereafter nonresident in the United States, who have been allotted land in Oklahoma or Indian Territory are hereby removed: * * *.

It will be observed that Mah-no-ne-mah was not living when the Act was passed. He died in April of the preceding year, but his widow, I-nesh-kin, who inherited an undivided half interest in the eighty acres, was living on June 21, 1906, and she was a Kickapoo allottee. Likewise as to Nah-she-pe-eth, the divorced wife of Mah-no-en-mah. Their

son, Pah-ko-che-pe-ta, had died within a year after his father's death, and his mother inherited his half interest in the eighty; and she too was on June 21, 1906, an adult Kickapoo allottee. The lower court also found, and the proof sustains it, that I-nesh-kin and Nah-she-pe-eth "were adults and residing in the Republic of Mexico on the twenty-first day of June, 1906, and thereafter."

It should be said an undivided four-ninetieths interest in the eighty acres was acquired from a minor heir of I-nesh-kin through proceedings in partition in the state court in 1930, in which the whole eighty was sold for $4,000.00, its appraised value.

On June 21, 1906, I-nesh-kin and Nah-she-pe-eth held full title to Mah-no-ne-mah's allotment, and the Act removed all restrictions as to its sale and incumbrance on the facts stated. See *Johnson* v. *United States*, 283 Fed. 954.

The decree appealed from dismissing the bill is affirmed.

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